

AMERICAN CULTURAL RESOURCES ASSOCIATION  
Comments on Draft Nationwide Programmatic Agreement  
Regarding the Section 106 National Historic Preservation Act Review Process  
Docket No. 03-128  
August 7, 2003

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**Federal Communications Commission  
Office of the Secretary**

August 7, 2003

Marelene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: Docket No. 03-128  
Comments on Draft Nationwide Programmatic Agreement  
Regarding the Section 106 National Historic Preservation Act Review Process

Dear Ms. Dortch:

The American Cultural Resources Association (ACRA) appreciates the opportunity to comment on the draft Nationwide Programmatic Agreement. ACRA is grateful for the opportunity to participate over the past few years in the Telecommunications Working Group organized by the Commission and others. Our comments reflect the familiarity and experience of our members in assisting telecommunication and tower applicants with Section 106 of the National Historic Preservation Act.

ACRA supports the objectives of the Nationwide Agreement, which are to provide guidance specifically for the types of undertakings that the Commission oversees and to streamline the process while adhering to the regulations protecting the historic properties. Our comments are presented in the following pages. They are organized with general comments first, followed by comments keyed to specific parts of the draft Nationwide Agreement. ACRA has not provided comments on those issues that are more appropriately addressed by others.

Please feel free to contact me if you have any questions. My telephone number is 252-641-1444. You may also contact the chair of ACRA's Cell Tower Subcommittee, Jo Reese, at 503-761-6605.

Sincerely,

Loretta Lautzenheiser, RPA  
President

Attachment

10/1/03 C+K

Notice of Proposed Rulemaking solicited comments on certain issues, presented in Section II

II 4 Request for ideas on the transition when the Nationwide Agreement takes effect

COMMENT 1 For those undertakings in-process at the time the Nationwide Agreement becomes effective, ACRA suggests that a mutual agreement between the parties (e.g., applicants and the SHPO) can be formulated for those situations that are inconsistent with the procedures outlined in the NA, and that instances where there is disagreement, the Nationwide Agreement should prevail

II 5 Notification in rules to applicants that the NA applies

COMMENT 2 ACRA is supportive of the proposed wording to notify applicants of their responsibility to complete the Section 106 process

Draft Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission

General

COMMENT 3 ACRA appreciates the recognition that experienced professionals in archaeology, architectural history, history, and other fields in historic preservation can greatly assist applicants in completing the Section 106 review process. This acknowledgement is presented as a "Whereas" clause and in the introduction of Section VI

COMMENT 4 The draft document is very well organized, clearly worded, and, with just a few exceptions, is comprehensive in outlining the procedures

III Undertakings Excluded from Review

COMMENT 5 (Page A-8) III A 3 c Experimental authorizations

A grant of experimental authorization that is allowed as an exemption from review should have an expiration, and the 24 months that the FCC proposes seems to be sufficiently lengthy. The experimental facility should still not have an adverse effect that cannot be reversed. That is, this exemption should not be used to allow a facility to be placed on a significant archaeological site, traditional cultural place important to a tribe, or historic building that is eligible for listing in the National Register

III A 4 Exemption for a facility placed within a modern industrial, commercial, or governmental-office facility

COMMENT 6 (Page A-8 - A-9)

1 The 200-foot distance between the proposed facility—which can be up to 400 feet tall—and a "structure 45 years or older" is too small. A historic property that is 200 feet from a 400-foot tower is likely to be adversely effected, this is contrary to the goals of the exemptions, which are to allow those undertakings unlikely to have an adverse effect on historic properties to proceed without review. ACRA agrees with the footnoted suggestion offered by the Ohio SHPO of a minimum distance of 400 feet, or the alternative wording that the minimum distance be equal to the height of the proposed facility

COMMENT 7 (Page A-8)

2 The wording is incorrect, in that it notes "where no structure 45 years or older is located within " and it should be, "where no building or structure 45 years or older " Without this change, it will not be consistent with the rest of the Nationwide Agreement document nor with the NHPA

III A 5 Exemption of review for placement of a facility in or near utility/transmission line corridors, interstate highways, and passenger railroad corridors

COMMENT 8 (Page A-9)

1 The paragraph noting exceptions from the exemption for facilities in three cases are overly narrow and are likely to have an adverse effect in some instances. In case (1), the exemption is excluded where the existing utility, highway, or railroad is "*included in the National Register*." But this exclusion from the exemption should also apply for those utility lines, highways, and railroads that have been determined eligible but that are not listed. ACRA recommends changing the phrase to read as follows: "(1) the existing highway, railway line, or communications structure is *eligible for listing or is included in the National Register*."

COMMENT 9 (Page A-9)

2 Comment 7, noted above in III A 4 regarding the use of the term "structure," applies to item (2) in that a structure is only one, narrowly defined type of resource, and the intent is probably to include buildings. The recommended wording is, "of any other *building or structure* that is 45 years or older."

III B Consultation with Tribes with regards to exemptions

COMMENT 10 (Page A-10)

1 The first sentence of this section appears to have retained an earlier organization of the proposed Nationwide Agreement. The situations in which the Navajo Nation would like tribes to have notification of an undertaking references Sections III A 1, 2, 4, 5, and 6. Since in an earlier version of the Nationwide Agreement, A 1 was the current A 4, and the present wording of A 1 is for maintenance of an existing tower, which is unlikely to be of concern, these need to be checked for consistency. ACRA defers to comments from tribes with regards to this issue.

COMMENT 11 (Page A-10)

2 ACRA respects the concerns of tribes regarding identification of adverse effects on significant tribal cultural resources that are not within reservations and the desire to be notified of undertakings that are exempted from Section 106 review. To address the concerns of the applicants regarding this notification, ACRA suggests that the timeline for the tribes to reply regarding a concern or an objection be specified. In other words, replace the current wording of a "reasonable opportunity to indicate" an objection, with "15 days" or "30 days" to object. Also, if there is a concern, the comment from the tribe should note that the tribal government is aware of a particular resource that may be adversely effected. As noted in the paragraph, the review then would follow the process for those undertakings that are not exempted. To address the third paragraph in this section, it is possible that other programmatic agreements that have excluded this type of provision to notify tribes may have been made prior to the current regulations which afford tribal governments more of a role in the process than in the past.

IV Participation of Indian Tribes and Native Hawaiian Organizations in Undertakings off Tribal Lands

COMMENT 12 (Page A-11 – A-15) Two versions of this section are offered in the draft Nationwide Agreement. Alternative A outlines the procedures in more detail and affords more streamlining than does Alternative B. Therefore, ACRA is more supportive of Alternative A than B.

VI Identification, Evaluation, and Assessment of Effects

COMMENT 13 (Page A17 - A-18) Section VI B 2 a outlines APE parameters for towers of different heights. ACRA agrees with the footnoted comment by the Conference that would add a consultation step with the SHPO for towers of 1,000 feet or taller.

COMMENT 14 (Page A-18) Section VI B 2 c notes that the Commission will provide a decision on an alternative APE within "a reasonable period of time." ACRA suggests that the timeframe for this decision should be noted, and either a 15- or 30-day-period is not unreasonable.

COMMENT 15 (Page A-18) Section VI C 3 states that "No archaeological survey shall be required if the Undertaking is unlikely to cause direct effects to archaeological sites." Who will make this decision and how does

that fit in the process? The following wording, situated between the two sentences in this paragraph, is suggested, and it is in keeping with the goal of streamlining and is consistent with the other paragraphs in VI C

“The results of the research or of a background review and a description of the current physical conditions of the site that support a finding that an archaeological site is unlikely, will be presented in the Submission Packet under 4 b of Attachment 3 or 4, whichever applies ”

COMMENT 16 (Page A-18) Although generally appropriate for cellular facilities, the wording in VI C 4 , which “assume[s] that no archeological resources exist” if there has been prior disturbance to a depth of two feet should address the potential for significant archaeological resources that are deeply buried ACRA recommends the following wording to be added at the end of the last sentence, which is still within the streamlining process but would address the protection of such sites

“ but except where the SHPO/THPO determines that a specific geomorphic setting contains the potential for a significant, deeply buried archaeological site ”

If this wording is unacceptable, then removal of the parenthetical statement of “(excluding footings and similar limited areas of deep excavation)” would accomplish the desired purpose

COMMENT 17 (Page A-19) The current wording in the draft Nationwide Agreement regarding when there would be an adverse effect caused indirectly by construction of a tower, outlined in VI E 3 , is fine ACRA strongly opposes acceptance of the suggested wording by the PCIA (footnote 13), which implies that a determination of an adverse (indirect) effect would occur only in a situation where the facility is placed “within the actual boundary of” specific, narrowly limited, types of historic properties The PCIA wording is not consistent with the purposes of the NHPA

#### VII Procedures

COMMENT 18 (Page A-20) ACRA suggests that the period for re-submitting a Submission Packet after a finding that it is inadequate be unspecified, and that “within 60 days” be deleted from VII A 4 What happens if this 60-day period is not met? What is the purpose of a deadline for a revised submittal?

COMMENT 19 (Page A-21) For determinations of No Historic Properties Affected, it is unclear what happens after the step (VII B 4 ) where the applicant and SHPO/THPO disagree on the finding of effect and the applicant has submitted the matter to the Commission for its review ACRA suggests that the signers of the Nationwide Agreement provide guidance at this step An earlier version noted that if the Commission determined there was no effect, the process was complete, ACRA recommends this wording

COMMENT 20 (Page A-21) Where the applicant has provided a finding of a determination of no adverse effect and the SHPO/THPO has not provided written notice to the Applicant of its review within 30 days of receipt of the filing, the draft Nationwide Agreement asks that the applicant provide the information to the Commission (VII C 2 ) This would complete the Section 106 process, unless “the Commission notifies the Applicant otherwise within a period of time to be specified by the Commission ” This seems open-ended, and ACRA suggests that the Commission provide a request of additional time for review within a specified time of receipt of the submittal, perhaps 5 days or 10 days There needs to be a firm end point

COMMENT 21 (Page A-22) As with a dispute in the determination of no effect between the applicant and the SHPO/THPO, in cases of dispute on a determination of no adverse effect, the applicant may submit directly to the Commission (VII C 4 ) It is unclear what happens at the Commission at this point As suggested in Comment 19 above, ACRA suggests that the signers of the Nationwide Agreement provide guidance at this step An earlier version noted that if the Commission determined there was no adverse effect, the process was complete, ACRA recommends this wording

COMMENT 22 (Page A-23) In cases where the SHPO/THPO and Applicant cannot agree and there have been discussions regarding conditions that would allow the SHPO/THPO to make a determination of no adverse

effect, the PCIA suggests (Footnote 17) that the Commission make its own conditional no adverse effect determination rather than allowing this to be left with the SHPO/THPO. It should be kept in mind that if the SHPO/THPO makes a determination that the undertaking would have an adverse effect and the applicant disagrees, the applicant can take the matter to the Commission.